Filed 7/30/19 P. v. Otis CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. RYAN EARL OTIS, Defendant and Appellant.	F075975 (Super. Ct. No. F17901321) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Jacquelyn Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Ryan Earl Otis challenges his conviction for one count of felony domestic violence resulting in corporal injury, with a previous such conviction in the last seven years (Pen. Code, § 273.5, subd. (f)(1)). He asserts the court erred by instructing the jury with CALCRIM No. 372 regarding flight, proceeding with the case despite a

speedy trial violation, admitting Evidence Code section 1109 evidence without weighing its potential for prejudice against its probative value, declining to instruct the jury on defense of property, and failing to hold a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) before sentencing in light of defendant's statement that he wanted to fire his counsel. The People concede the matter should be remanded for the trial court to conduct the requisite *Marsden* hearing and, if necessary, for a new sentencing hearing on that basis should new counsel be appointed.

We remand to the trial court to conduct a *Marsden* hearing and, if defense counsel is dismissed, order new defense counsel be appointed and a new sentencing hearing be held. On all other grounds, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Jeremy Whaley testified that at around 7:00 a.m. on March 2, 2017, he woke up to his neighbor Lori banging on his window saying, "'He's taking all my stuff. Help me.'" Whaley got dressed and went outside where he saw Lori and defendant arguing in the street while defendant "was pushing two wheelbarrows" and Lori "was walking down the street behind him." Whaley did not notice any injuries on Lori or defendant at that time. According to Whaley, "there was a weed-eater in the wheelbarrow" "that was sitting in the street" and Lori was arguing with defendant, telling him it was hers. Lori then "took off running to get the weed-eater out of the wheelbarrow. She got it out [and] started running back down the street" towards Whaley's house. Whaley then saw defendant run toward Lori. Lori "threw the weed-eater [aside] because [defendant] was getting close to her." When Lori turned around to face defendant, defendant ran up to her and shoved her with both of his hands. Lori fell backwards to the street and Whaley pushed defendant away from Lori. Whaley told defendant to "[g]et out of here," and then he called 911. Lori had "blood coming down her forehead." Defendant then picked up the weed-eater, walked back to the wheelbarrow that was in the street, and pushed it to his house. The People introduced the recording of Whaley's 911 call at trial. In it, Whaley explained to

the operator that Lori's "boyfriend or her ex … came and slammed her down in the street and she hit her head and … she's bleedin'."

When police arrived, there was a pool of blood on the pavement where Lori was lying. There were no wheelbarrows in sight. An ambulance transported Lori to the hospital and the police took a statement from Whaley. According to Officer Charles Martinez, Whaley reported defendant picked up Lori and slammed her on the ground. Whaley stated defendant then walked away. Martinez sent units to the house defendant had walked toward in an effort to locate him.

One officer saw defendant "peer his head out of the residence and then go back in the residence." The police secured the perimeter around the house and Officer Peter Flores and another officer went to the door. Officer Flores knocked loudly and announced it was "Fresno P.D." and he "asked for [defendant] to step out of the residence." After a few seconds during which no one responded and he heard nothing, Officer Flores knocked on the door again; again, he received no answer. He asked "dispatch to try to locate a phone number for that residence and attempt[ed] contact that way," but no one answered and the call went to voice mail. The police continued to knock on the door and requested a canine unit. They then made a canine announcement on the public address system before knocking again. About 10 or 15 minutes after the police had initially begun knocking, defendant responded and stated he was injured. Defendant came to the door and Officer Flores noticed an injury above defendant's eye. Defendant reported "he was in a dating relationship with" Lori and they lived together. He stated they had "had a verbal disturbance and somehow, he got hit from behind and was struck in the head. He didn't know who struck him in the head." Officer Flores thought defendant "stated he was taking some of his property" and he "recall[ed] something about a wheelbarrow." Defendant denied hitting Lori.

At the hospital, Whaley saw injuries to the back of Lori's head where Lori received eight staples. At trial, the People introduced photographs of Lori from the hospital and footage from an officer's body camera showing Lori's injuries.

During his closing argument, defense counsel conceded defendant pushed Lori. He argued: "Is there any question that [defendant] pushed her, no. There is no question about that. He was obviously there. He obviously pushed her. The real issue is … the severity of the injury, is that enough for a felony."

The jury convicted defendant of felony domestic violence resulting in corporal injury, with a previous such conviction in the last seven years (Pen. Code, § 273.5, subd. (f)(1)). The court sentenced defendant to four years' imprisonment enhanced by an additional three years for three admitted prison priors pursuant to section 667.5, subdivision (b).

DISCUSSION

I. The Trial Court Did Not Err in Instructing Jury Regarding Flight (CALCRIM No. 372)

Defendant first argues the court prejudicially erred in instructing the jury with CALCRIM No. 372 regarding flight.

A. Relevant Factual Background

In deciding whether to instruct the jury on flight, the court rejected defendant's objection:

> "THE COURT: … I did want to put argument regarding the flight instruction we discussed off the record yesterday, which is 372. The court is intending to give that based on several factors. One is the fact that the testimony was there was [*sic*] several instances where the officers were knocking loudly on the door and announcing their presence as police officers and getting no response. I did go back and look at the testimony. There was actually testimony that at one point, an officer saw [defendant] looking out the window at him, but still did not open the door, and testimony that canine advisements were made over the officer's P.A. system, and still, there was a significant delay in [defendant] actually opening the door, so based on all of those factors taken together, the court

intends to give 372. I'll certainly entertain argument for or against that instruction. I'll start with the defense.

"[DEFENSE COUNSEL]: We'll object to that instruction. As he walked away, the police were not on-scene. There was a slight delay, 10, 15 minutes. However, based on Officer Flores' testimony, we believe that the investigation was a little shoddy and we don't believe the timeline for 15 minutes is correct. Submit."

The court ultimately instructed the jury with CALCRIM No. 372 regarding flight, which provides:

"If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct, however, evidence that the defendant fled cannot prove guilt by itself."

During his closing, defense counsel argued defendant had a Fifth Amendment right not to answer the door and the court interjected:

"[DEFENSE COUNSEL]: … He goes in his house, shuts the door, his residence, where he dwells, where he sleeps at night. The cops show up, start banging on the door. He doesn't answer. Why do you have to answer? He has a Fifth Amendment right. No one has to answer a door under those conditions.

"THE COURT: I'm going to interrupt. There is a Fifth Amendment right not to talk to law enforcement if you want to not talk. There is no right to disregard an order to answer a door if you're ordered to answer a door. You may he [*sic*] proceed."

B. Standard of Review and Applicable Law

Penal Code section 1127c requires a trial court in any criminal proceeding to instruct as to flight where evidence of flight is relied upon as tending to show guilt. Flight does not require a defendant to physically run from a scene, nor does it require the defendant to reach a place of safety. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) "[A] flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a

consciousness of guilt.'" (*Ibid.*) Flight requires "'a purpose to avoid being observed or arrested.' [Citation.]" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60.)

C. Analysis

Defendant contends the jury instruction on flight was improper because his failure to open the door did not amount to a departure from the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. Citing various portions of the record, defendant argues the instruction was not motivated by his departure from the scene of the crime because he left as a result of Whaley instructing him to do so. Additionally, he asserts for the first time that he "was exercising his Fourth Amendment rights against unreasonable searches and seizures when he did not open his door." He contends, given that the police did not have a warrant and exigent circumstances did not exist, his exercise of such rights should not permit an inference of consciousness of guilt. He argues "'[i]t is of no consequence that police had a right to enter without a warrant here, nor does it matter that defendant spoke to the police during the siege.'" The People respond "the trial court properly found that [defendant's] peering out of the window and then failing to respond to the police request to come outside could be evidence which the prosecutor could rely on in arguing consciousness of guilt and the jury could use to find a consciousness of guilt."

Here, the evidence supports the flight instruction. Defendant departed the scene of the crime before police arrived when Whaley called 911. Police repeatedly knocked on defendant's door and announced their presence, asking defendant to come out. They further announced on the public announcement system that a canine unit was to be deployed. There was evidence defendant peered out the window and was thus aware of the police presence but failed to respond or answer the door for 10 to 15 minutes. From this evidence, the jury could have concluded defendant—knowing he had pushed Lori and left the scene and knowing the police were at his door—failed to answer the door or

respond in an attempt to avoid detection or arrest for his crimes. As such, the instruction was proper.

For the first time on appeal, defendant also challenges the inclusion of the flight instruction on the basis that the exercise of his Fourth Amendment right against unreasonable searches and seizures should not permit an inference of consciousness of guilt. In support, defendant relies upon *People v. Keener* (1983) 148 Cal.App.3d 73 and *People v. Cressey* (1970) 2 Cal.3d 836. But defendant did not argue the inclusion of CALCRIM No. 372 implicated his Fourth Amendment rights below, nor did he object to the admission of evidence of his failure to respond to police when they came to his home at any time. Thus, he has forfeited this argument on appeal. (Evid. Code, § 353, subd. (a).)

Irrespective, the cited authorities are inapposite. True, in *People v. Keener* the Fourth Appellate District concluded the court erred in admitting evidence related to the defendant's refusal to consent to police entry into his house in order to demonstrate a consciousness of guilt because it would "punish the exercise of the right to insist upon a warrant." (*People v. Keener*, *supra*, 148 Cal.App.3d at p. 79.) But the inclusion of a jury instruction on flight was not at issue in *Keener* and there was no suggestion Keener left the scene of a crime, immediately fled to his home, and then refused to respond to the police as defendant did here. And here, unlike in *Keener*, there was no evidence the police attempted to enter defendant's house. Similarly, *People v. Cressey* also did not deal with a flight instruction. (*People v. Cressey*, *supra*, 2 Cal.3d at p. 841, fn. 6.) Rather, in that case, an officer broke into the defendant's home to arrest him, and the validity of the arrest warrant was in question. (*Id.* at p. 840.) On appeal, the court noted the Attorney General did not seek to justify the defendant's arrest in his home based on his refusal to answer the door, stating Penal Code section 1531 does not require an occupant open his door to admit an officer. (*People v. Cressey*, *supra*, at p. 841, fn. 6.) Again, here, there is no evidence the police attempted to enter defendant's house as they

did in *Cressey*. And neither the *Cressey* court nor the *Keener* court addressed the matter at issue in this case—whether the inclusion of a flight instruction was proper after evidence was admitted, without objection, that defendant fled to his home immediately following a crime, peered out at police officers, and refused to respond. Accordingly, even if defendant had adequately preserved this issue, we conclude the cited authorities are inapplicable to this case.

Moreover, even if we were to agree that instructing the jury with CALCRIM No. 372 was error, as our Supreme Court has repeatedly held, the giving of the instruction would be harmless as the "instruction did not assume that flight was established, leaving that factual determination and its significance to the jury." (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 61; see *People v. Carter* (2005) 36 Cal.4th 1114, 1182–1183.) If, as defendant contends, there was insufficient evidence of flight, the instruction, by its own terms, had no application for the jury. Additionally, where a trial court gives a legally correct but inapplicable instruction, the error "'is usually harmless, having little or no effect "other than to add to the bulk of the charge."' [Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 841.) And here, the trial court informed the jury that some instructions may not apply. The jury is presumed to have understood and followed the instructions it was given and disregarded the flight instruction if it concluded the evidence did not support it. (See *People v. Visciotti*, *supra*, at p. 61 [even if flight instruction should not have been given, it was "clearly harmless"].)

Furthermore, as discussed *post*, the evidence of guilt against defendant was compelling, such that any error was clearly harmless. Accordingly, we similarly cannot conclude the court's brief comment made during defendant's closing to which defendant did not object, even it was made in error, prejudiced defendant.

We reject defendant's first contention.

II. The Trial Court Did Not Err in Denying Defendant's Motion to Dismiss for Speedy Trial Violation

Defendant next contends his case should have been dismissed because his right to a speedy trial was violated under Penal Code section 1382.

A. Relevant Factual Background

Defendant was arraigned in this case on March 30, 2017, and did not waive time for trial. Accordingly, the timeout date was set for May 30, 2017. Defendant concedes counsel was unable to schedule trial before May 30, 2017, so trial was set for that date. Indeed, at an April 27, 2017, hearing during which the parties discussed the trial setting, the prosecutor and defense counsel both noted conflicts they had in May 2017:

> "THE COURT: How are we proceeding in this matter, Counsel?
>
> "[DEFENSE COUNSEL]: Your Honor, we're confirming trial.
>
> "[PROSECUTOR]: And, Your Honor, the People have no issue confirming. I did tell defense, though, I need the date of May the 22nd. I'm unavailable May the 10th through the 19th and I return on May 22nd.
>
> "[DEFENSE COUNSEL]: Your Honor, I have a prepaid vacation starting on the 22nd and I don't come back until the 20th—wait. Hold on. Where is that? I don't come back until the 30th.
>
> "THE COURT: Timeout in this matter is that May 30th date. [¶] And, [prosecutor], you say you are gone from what date to what date?
>
> "[PROSECUTOR]: From May the 10th through May 19th and it's a prepaid out-of-state vacation.
>
> "THE COURT: I don't know what counsel wants to do. I can set it on the last day, that's the 30th. Both counsel would be back, but it is the last day. I can set it on the 4th earlier. That gives you a week to gather witnesses together.
>
> "[DEFENSE COUNSEL]: On July 4th?
>
> "THE COURT: We're talking about May or [defendant] can waive time. May 30th plus some days.
>
> "[DEFENSE COUNSEL]: No.

"THE COURT: I'm certainly not suggesting that, but when you suggest July it make me assume that there's a time waiver.

"[DEFENSE COUNSEL]: No. I was about to—whatever. No, we're not waiving time.

"THE COURT: May 4th then?

"[PROSECUTOR]: I think it would be included the time for the—I would request a setting closer to the time-out date.

"THE COURT: So, Counsel, you see the calendar in May. You have heard what your unavailability is. You've heard what [defense counsel]'s unavailability is. May 30th is the timeout. May 29th is a holiday.

"[PROSECUTOR]: I would request that it be set on May the 30th, if that's the first date that counsel is available.

"THE COURT: The matter is set on the time-out date of May 30th, 2017 at the request of counsel. The minute order should reflect that both counsel are unavailable in the month of May starting on—that's May 10th that's your unavailability; is that correct?

"[PROSECUTOR]: Yes, Your Honor.

"THE COURT: Starting on May 10th.

"[DEFENSE COUNSEL]: Thank you, Your Honor."

Accordingly, the court set defendant's trial for the timeout date, May 30, 2017. On that date, the court addressed the parties' motions in limine and defense counsel argued the case would timeout without an impaneled jury by that date. But he also noted he needed time to discuss the motions in limine with defendant:

"THE COURT: This matter is assigned here for jury trial. Today is the timeout date. The court is devoting its time entirely to this case. I will not be here tomorrow due [to] a medical procedure. The court will not be taking up other matters on Thursday, so it is here for trial, and the only case this court is going to be working on is this case for trial. So did the defense wish to place anything on the record regarding that?

"[DEFENSE COUNSEL]: Nothing. We're not stipulating to anything at this point. The defense's position is this case is timing out today without an impaneled jury.

"THE COURT: It's your position that a jury has to be sworn today?

"[DEFENSE COUNSEL]: Yes, prior to the timeout date, which is today.

"THE COURT: Do you have any authority for that?

"[DEFENSE COUNSEL]: No, I don't. I know there is split authority, though.

"THE COURT: Okay. We can take up that again at 1:30, but I believe the court has made a record, that it's not interrupting this case to deal with any other cases, and I've made a record as to why jury selection will start on Friday morning. The court does not believe, and I'll put some authorities on the record at 1:30, that a jury has to be impaneled in order for the timeout date to have been satisfied. Any other issues we need to address this morning before reconvening for in limines?

"[PROSECUTOR]: Just briefly. I believe it's on the record in department 54, but just that our start time at 9:45 was a result of the defense's request, and the defense also requested time to speak to his client, so I wanted that noted as to the manner in which we are proceeding this morning.

"THE COURT: That is accurate. In chambers the court granted the defense's request to hold off on doing any in limines or 402 hearings until 1:30 this afternoon so it could inquire or do further research into the 1190 [*sic*] issue.

"[DEFENSE COUNSEL]: Correct.

"THE COURT: Did the defense wish to place anything on the record as to that?

"[DEFENSE COUNSEL]: Only that referring to the People's argument right now, that it was the defense's request to prolong certain issues, but the idea of impaneling a jury replaced those requests by the defense's request is irrelevant and impossible given the nature of selection time for a jury.

"THE COURT: Well, let me main [*sic*] sure we have a full record here. If it's your position that a jury has to be called and has to be sworn by the end of today, then we'll take up in limines right now and I'll call for a panel this morning, and we can start this morning for selection. Is that what you're requesting?

"[DEFENSE COUNSEL]: I'm not requesting—frankly, I believe it would be impossible to impanel a jury—

"THE COURT: I don't care about possibilities. You're telling me I have to impanel by this afternoon or dismiss this case. Are you asking to wait until 1:30 to do in limines, or do you want to start jury selection this morning as in right now?

"[DEFENSE COUNSEL]: I'd rather wait till this afternoon.

"THE COURT: Understanding that would have an impact on your argument that there should be a dismissal if we don't have a jury sworn today?

"[DEFENSE COUNSEL]: I do."

After the recess, the court revisited the discussion regarding the timeout date and the parties' conflicts:

"THE COURT: Back on the record. We have both counsel present. [Defendant] is present. [¶] I want to start by revisiting the issue that this is the timeout date. As far as the court being dark tomorrow, the court's relying on the case of Burges, B-u-r-g-e-s, Superior Court, 2306 Cal.App.4th, page 17, which is a 2012 case. The case has been assigned here for trial. The court is going to be devoting all of its resources to this trial. Tomorrow the court is unavailable due to a medical procedure that's been scheduled and involves general anesthesia, and so I'm not going to be functional. I will not be entertaining any work or any other cases. All resources of this court will be dedicated to this case, so based on that authority, the court is finding that for purposes of the court, we are in trial as of today. I did not inquire further. I know in chambers we talked about the fact that the People were not available on Thursday, but I didn't inquire further as to why.

"[PROSECUTOR]: Yes, Your Honor. I do have a meeting that was set up with a different office regarding human trafficking, and it's one that—actually, the meeting is from 2:00 to 3:30, so I could be available that morning, and it's right over here at Fresno P.D. It's just one that was limited, and that was previously scheduled.

"THE COURT: Is this one where you're receiving training, or giving training, or what type of meeting is it?

"[PROSECUTOR]: It's a task force meeting to combat human trafficking with different justice partners, and the only reason it's so unique

is that Senator Diane Feinstein would be present, and in order to have that meeting happen, it's not something that I could reschedule or be a part of at a later date, and it's very limited. It's only 20 or so participants there, and it's for that narrow window of time, from 2:00 to 3:30.

"THE COURT: So what we're going to do, then, is we'll have a panel here tomorrow morning. We'll have a longer lunch break to accommodate you being able to attend the meeting.

"[DEFENSE COUNSEL]: I apologize. The defense isn't objecting to any continuances based on the prosecution's reasons. I want to let the court know, I was just informed, I didn't calendar it. It's a felony sentencing. I want to say it's in 62, whatever department Cardoza is in, and it's, I think, at 9:00.

"THE COURT: Tomorrow or Thursday?

"[DEFENSE COUNSEL]: Tomorrow.

"THE COURT: Tomorrow is not a problem because the court is not here, but do I understand correctly that the defense has no objection to being dark on Thursday?

"[DEFENSE COUNSEL]: I have no objection.

"THE COURT: So with that understanding, we'll leave the jury panel coming on Friday morning."

Jury selection began on June 2, 2017.

B. Standard of Review and Applicable Law

Penal Code section 1382 requires dismissal if a felony case has not been brought to trial within the prescribed time limit "unless good cause to the contrary is shown," the defendant enters a general waiver of the 60-day trial requirement, or the defendant requests or consents to a trial setting beyond the 60-day window. Section 1050 also provides that a trial court may grant continuances "only upon a showing of good cause." (§ 1050, subd. (e).) Neither section 1050 nor section 1382 defines "good cause." Rather, "the determination of whether good cause for a continuance has been shown is typically made by the trial court in the exercise of its discretion based on the totality of the circumstances." (*Burgos v. Superior Court* (2012) 206 Cal.App.4th 817, 827.)

"[N]umerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay." (*People v. Sutton* (2010) 48 Cal.4th 533, 546.) "The cases recognize that, as a general matter, a trial court 'has broad discretion to determine whether good cause exists to grant a continuance of the trial' [citations], and that, in reviewing a trial court's good-cause determination, an appellate court applies an 'abuse of discretion' standard." (*Id*. at p. 546.)

C. Analysis

Defendant argues his case should have been dismissed because he was not brought to trial within Penal Code section 1382's prescribed time limit, he did not waive time or consent to a trial setting beyond the statutory period, and good cause did not exist to excuse the delay. Additionally, he contends "[t]he court made no determination that good cause had been shown." The People note defendant never moved to dismiss the case for a speedy trial violation and thus, he forfeited his claim. They further respond defendant consented to the delay "in order to consult with his attorney and do legal research" and by not objecting to the delay caused by the prosecutor's prior commitments.

The People correctly note the record does not reflect defendant moved to dismiss the case based on the alleged speedy trial violation and thus, he forfeited this issue on appeal. (See *People v. Wilson* (1963) 60 Cal.2d 139, 146–147 ["The right to a speedy trial … will be deemed waived unless the defendant *both* objects to the date set *and* thereafter files a timely motion to dismiss.… [¶] [I]t is … well settled that even after … an objection 'There is *no duty incumbent on the court* to order dismissal under said section 1382 *unless* the defendant demands it' … [citations]. … The defendant must … move to dismiss after the expiration of the allowable delay (but before the beginning of

trial) so that if the court decides that the statutory period has been exceeded, that there has not been good cause for the delay, and that a proper and timely objection was made, a futile trial will be avoided."].)

Even if trial counsel had made a motion to dismiss for delay, the motion would have been futile. The matter was set for trial within the 60-day time limit and it began on the date set. It was not continued to another day, and motions in limine were heard that day. As such, the matter was brought to trial within the statutory time limits as interpreted by case law. (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780 ["an accused is 'brought to trial' within the meaning of [Penal Code] section 1382 when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion"]; *Burgos v. Superior Court*, *supra*, 206 Cal.App.4th at p. 833 [same].)

To the extent defendant is contending the two-day postponement for jury selection based on counsels' and the trial court's scheduling conflicts constituted a delay in the proceedings, defendant fails to establish the trial court abused its discretion in permitting the postponement. Notably, the prosecutor was not at fault for the case not being ready to proceed on the timeout date; she announced the People were prepared to proceed. Rather, despite stating he was ready to proceed, defense counsel declined the court's offer to begin jury selection the morning of May 30, 2017, the timeout date, in order to permit him to conduct further research and confer with defendant. By doing so, defense counsel impliedly consented to postponement of jury selection and also provided good cause for the postponement. (See, e.g., *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 970 ["counsel necessarily consents to postponement when he or she is not unconditionally ready for immediate trial due to conflicting commitments to other clients"]; see also *People v. Johnson* (1980) 26 Cal.3d 557, 570 ["[D]elay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances such as the unexpected illness or unavailability of counsel or

witnesses constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause." (Fns. omitted.)].) The court and prosecutor's subsequent unavailability, to which defense counsel stated there was no objection, provided good cause to postpone the trial for two more days. (*People v. Sutton, supra*, 48 Cal.4th at p. 547 ["Past California decisions have examined a wide variety of circumstances that have been proffered or relied upon as a basis under [Penal Code] section 1382 for finding good cause to delay a trial, including (1) the unavailability of a witness, (2) the unavailability of a judge, (3) the unavailability of a courtroom, (4) counsel's need for additional time to prepare for trial, (5) the unavailability of counsel, and (6) the interest in trying jointly charged defendants in a single trial."].) Considering the totality of the circumstances, good cause supported postponement of jury selection to the fourth day of trial. Consequently, were we to consider defendant's contentions on the merits, we would reject them.

III. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence Pursuant to Evidence Code Section 1109

Defendant next asserts the trial court erred in admitting evidence of defendant's other acts of domestic violence pursuant to Evidence Code section 1109 because such evidence was more prejudicial than probative under section 352 and the trial court did not conduct a balancing test on that basis.

A. Relevant Factual Background

Before trial, defendant argued his prior domestic violence convictions should not be admissible under Evidence Code section 1109:

> "[DEFENSE COUNSEL]: Your Honor, I researched it. The only thing I have, and I think it might be in my motion, was Carter, 19 California 4, 1236. I think this case deals with intent. I believe there is another case, Tewalt, 7 California, 380. I'll go through them one by one. It seems its intent on one of one [*sic*] of the exceptions and not for, I guess, propensity to act in accordance on a prior occasion. This stands for—the intent has to be substantially similar to the prior act, and this act, I believe—I know they're both domestic violence acts, but I don't know how similar they

really were. One was more violent than the other, if it was the same person, what were the circumstances of it. I don't have any meat on the bone on that one. I don't see what the manifestations are of a common plan, other than there was domestic violence involved.

"THE COURT: I'm sorry, which authority are you relying on?

"[DEFENSE COUNSEL]: It's Carter, 19 California—

"THE COURT: Is that in your brief?

"[DEFENSE COUNSEL]: No, it's not. These are cases I just looked up right now. Carter 19, California 4th, 1236. Cal.App—I'm sorry, Cal.App.4th, 1236.

"THE COURT: And that stands for what proposition?

"[DEFENSE COUNSEL]: I think that the past intent, the past conduct and the present conduct for a prior, but I believe that case stands for the need them [*sic*] to be substantially similar in order for it to come in, in order to show intent and common scheme and plan, not simply for acting in conformity with. I believe the People are trying to produce these past instances of domestic violence to show an act in conformity therewith, maybe committing on this case, therefore, maybe committing on this case, and I believe the only way out of that, that's pure character. You have to prove intent, common scheme and plan motive, et cetera, et cetera. I don't believe any of that exists in these cases.

"THE COURT: Is Carter referencing an uncharged prior?

"[DEFENSE COUNSEL]: It does reference uncharged priors, yes.

"THE COURT: So I could see that in the context of whether or not prior conduct qualified as domestic violence under 1109, but given the fact that these priors are specific convictions for 273.5, which by definition, is domestic violence, I'm not sure what application Carter would have.

"[DEFENSE COUNSEL]: I'm also referencing 352 as well. There is substantial prejudice to [defendant], given the fact that we don't know how similar these acts were, and the defense's argument is that the prosecution is trying to hang [defendant] on those prior domestic violence, when we don't know what occurred in those domestic violence. Was there really—was he married? Were there children involved? How are these connections being made with these prior acts? These convictions, with this new conviction, is there similarity to it? There needs to be some type of common scheme and plan. There needs to be something that shows that it's

not purely—that it's not prejudicial, and the defense believes it's entirely prejudicial, and the jury is going to see it as if he committed this on this occasion, he is committing it now versus 'Let's deal with the elements of the case now.' Aside for the fact that it's a prior, we understand that they need to prove at least one prior for this. That's not my argument. My argument is if we're going to discuss these priors, the defense would like to know what happened in these prior instances, and I think there needs to be some type of connection for it to be prejudice, because it seems it's inflaming the jurors' passions. They're going to hear it. Without more, they're not going to know what the differences are in these circumstances. Maybe there are significant differences in the circumstance. The defense doesn't know.

"THE COURT: Well, there is a distinction between 1101(b) of the Evidence Code, where you're dealing with common schemes, intents, things of that nature, that you're referencing. 1109 is completely separate from that. Other than astringent [*sic*] evidence that might go to whether the prior conduct qualifies as domestic violence, the court doesn't believe that the underlying facts are relevant for 1109 purposes. In this case, there are no unchar[g]ed priors that are being proffered. These are all prior convictions for violations of Penal Code Section 273.5, which by definition, is a prior conviction for domestic violence, so the court does not believe the underlying facts are relevant for the purposes of 1109. 1109, on its face, is just prejudicial to anyone that is on the receiving end of it, because it is one of the exceptions that the legislature has put in place where the jury is allowed to use prior conduct, in this case prior convictions, for propensity, and that is extremely prejudicial, but the legislature has determined that it is also extremely probative, and I'm not going to make my own personal arguments for or against that position, but under 352, the probative value is the fact that it's allowed to be used for propensity. And while that is highly prejudiced, it's prejudice in the same sense that a confession is prejudice, so under 352, the court doesn't find that the prejudicial impact substantially outweighs the probative value, so at this point the court is allowing it. To make sure we make a clear record of this, the February 19, 2015 conviction for 273.5, Fresno Superior Court case F14908349 to be used as 1109 evidence. Also the May 14, 2008 conviction for Penal Code Section 273.5 in Fresno Superior Court case F08900216. Those would be only two prior convictions for domestic violence that the court's aware of. Is there anything else that the People are intending to use under 1109?

"[PROSECUTOR]: No. There is a third conviction, but it's outside of the 10 years, so the People were not intending to use it.

"THE COURT: So that will be the court's ruling on the 1109 issue."

B. Standard of Review and Applicable Law

"The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) But the Legislature has created exceptions to this rule in cases involving sexual offenses (*id.*, § 1108) and domestic violence (*id.*, § 1109.) The California Supreme Court has held that section 1108 conforms with the requirements of due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) And the analysis in *Falsetta* has been used to uphold the constitutionality of section 1109. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312; *People v. Price* (2004) 120 Cal.App.4th 224, 240–241.)

Evidence Code section 1109 provides (subject to certain exceptions not applicable here) that in a criminal domestic violence action, evidence of the defendant's commission of other domestic violence is not inadmissible character evidence under section 1101 if such evidence is not inadmissible pursuant to section 352. (Evid. Code, § 1109, subd. (a).) Section 352 affords the trial court discretion to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

"[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169; see *People v. Williams* (1997) 16 Cal.4th 153, 213 [rejecting argument trial court's comments were too short and conclusory to demonstrate

balancing required by section 352, Supreme Court stated "[a]ll that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352"].) Reviewing courts will "'infer an implicit weighing by the trial court on the basis of record indications well short of an express statement.' [Citation.] '[T]he necessary showing can be inferred from the record despite the absence of an express statement by the trial court.' [Citation.] But without an express statement by the trial court that it has weighed prejudice against probative value, the record must at least 'affirmatively demonstrate that the court did so.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1275.)

C. Analysis

Defendant argues, "[Evidence Code s]ection 1109 expressly requires the section 352 balancing, and in this case the court refused to get information about the underlying acts in order to weigh the evidence's prejudicial and probative value." He asserts, in holding admissible evidence of defendant's prior domestic violence conviction, "the court failed to properly weigh any 352 factors indicating prejudice, relying solely on the presumption of probative value under section 1109." We cannot conclude the court prejudicially erred in admitting such evidence.

Evidence Code section 1109 embodies a preference for the admissibility of propensity evidence related to domestic violence in contrast to section 1101, which sets forth a general prohibition on the use of propensity evidence. (See *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 ["[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence"]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333–1334 ["[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited"].) And, here,

the trial court specifically noted that it exercised its discretion under section 352 and determined the probative value of the proffered evidence was not substantially outweighed by the risk of undue prejudice or the consumption of time.

Defendant's prior acts of domestic violence were not remote in time, were against a different victim, resulted in convictions, and the parties in fact ultimately stipulated to their admissibility. Under these circumstances, we cannot conclude the trial court abused its broad discretion in concluding the probative value of the limited evidence of defendant's previous convictions were not substantially outweighed by the danger of undue prejudice. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 531–536 [concluding other acts of domestic violence admitted into evidence were not substantially more prejudicial than probative, in part because the acts (1) had resulted in convictions, (2) were similar to charged crimes, (3) were not too remote, and (4) evidence of current crime was strong, lessening possibility that jury would be swayed by evidence of past acts].)

But, even were we to conclude the trial court abused its discretion in failing to inquire further into the facts underlying the prior convictions because such facts were necessary for the court to sufficiently balance the probative value of such evidence against the potential for prejudice, we cannot conclude defendant was prejudiced by the admission of such evidence such that it was reasonably probable the admission of defendant's prior domestic violence convictions affected the jury's verdict. Here, the evidence against defendant was strong. An eyewitness testified defendant pushed Lori, causing her to hit her head against the ground and require immediate medical attention. Importantly, defense counsel conceded, in his closing argument, defendant pushed Lori. He argued: "Is there any question that [defendant] pushed her, no. There is no question about that. He was obviously there. He obviously pushed her. The real issue is … the severity of the injury, is that enough for a felony." To the extent there was a factual question regarding the severity of Lori's injury, the jury was presented photographs and

Whaley's testimony regarding the extent of her wounds. And we cannot conclude there is a reasonable probability the trial court's admission of the limited evidence of defendant's prior convictions, namely, the stipulation that the convictions occurred with no details regarding their underlying facts, affected the jury's verdict.

We reject defendant's third contention.

IV. The Trial Court Did Not Err by Refusing to Instruct the Jury Regarding Defense of Property (CALCRIM No. 3476)

Defendant also argues the court prejudicially erred by failing to instruct the jury regarding defense of property (CALCRIM No. 3476).

A. Relevant Factual Background

Defendant requested the jury be instructed with CALCRIM No. 3476 regarding the right to defend real or personal property. The court denied defendant's request, concluding there was no evidence the weed-eater Lori was alleged to have taken belonged to defendant and Lori ultimately threw the weed-eater aside:

> "THE COURT: We did discuss in chambers defense's request for an instruction on defense of property. Did you wish to make a record or argument for why the court should give that type of instruction?
>
> "[DEFENSE COUNSEL]: It's the defense position that we believe Officer Flores testified that when one of the wheelbarrows was next to the house where [defendant] had currently resided in. [¶] … [¶]
>
> "THE COURT: Back on the record. The request is for instruction 3476. That instruction goes to the use of physical force to prevent actual harm to property. The testimony that's currently before this jury is that the alleged victim in this case took a weed-whacker out of the wheelbarrow and was running back towards her house with it. That when the defendant approached her, she threw the weed-whacker to the side and was not in possession of the weed-whacker are [*sic*] at the time she was pushed, allegedly, and knocked to the ground. So your argument would be as to two things. Number one, that your client had an ownership interest in the weed-whacker, and number two, that since she was not in possession at the time he allegedly pushed her, that 3476 would apply?
>
> "[DEFENSE COUNSEL]: As to number one, once again, it's the defense position that I believe the first witness, Whaley, testified that the

weed-whacker was in a wheelbarrow next to the property where the defendant resided. And as to number two, I think the jury instruction said 'use reasonable force.' I think the force was used, whether it's reasonable, is for the trier of fact.

"THE COURT: My question on the second one, she was no longer in possession of the weed-whacker when he allegedly hit her. The moment she let go of it, if there was a legitimate right to use force, it would have stopped at the moment she was no longer in possession of the property.

"[DEFENSE COUNSEL]: She was no longer in physical possession of the property, but she was in constructive possession.

"THE COURT: As to the first prong, the testimony of Mr. Whaley was that the victim, and this is the only testimony in the entire trial regarding ownership of any of the property that was in any of those wheelbarrows, his testimony was that the alleged victim in this case was yelling that it was her property and asking him not to take her stuff. There is no testimony from any witness, including the officer who interviewed [defendant], about there being any possessory interest by [defendant] in any of the property. The only testimony before the jury actually goes in the opposite direction, that it was ownership by the alleged victim, not by [defendant]. So with no factual basis to support a property interest in [defendant], the court is not going to be giving 3476. Also, even if there had been some demonstration in the property of the weed-whacker the uncontradicted testimony is that the alleged victim threw that to the side as [defendant] approached her, and that any use of force after that fact, even if it had otherwise been justified earlier, would have ceased, so for those two reasons, the court is declining to give 3476, but there is a complete record, if that becomes an issue on appeal."

B. Standard of Review and Applicable Law

""""It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence"' and "'necessary for the jury's understanding in the case."'"" (*People v. Brooks* (2017) 3 Cal.5th 1, 73.) "A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court's decision de novo." (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

CALCRIM No. 3476 provides:

> "The owner [or possessor] of (real/ [or] personal) property may use reasonable force to protect that property from imminent harm.…
>
> "*Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm.
>
> "When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.
>
> "The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable to protect property from imminent harm. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime*>."

C. Analysis

Defendant contends there was substantial evidence the weed-eater belonged to defendant and thus, the instruction was supported. Additionally, he contends, there was evidence his property was "in immediate harm." We disagree.

Defense of property requires that a defendant's use of force be motivated by a reasonable belief in the need to protect his or her property from imminent harm. (See CALCRIM No. 3476.) Here, there was not substantial evidence defendant's property was faced with imminent harm and that he used force to protect it. While there was evidence Lori grabbed a weed-eater from a wheelbarrow, she threw it away before defendant shoved her, thereby eliminating any alleged risk of "imminent harm" to the property. Defendant continued to pursue Lori after she no longer had possession of the property. We are unpersuaded by defendant's argument Lori's alleged ongoing proximity to the weed-eater evidenced a risk of imminent harm, nor do we find evidence in the record of her distance from the weed-eater after she threw it. We also cannot conclude substantial evidence was presented supporting a finding the weed-eater

belonged to defendant. Thus, the trial court did not err in failing to instruct the jury with CALCRIM No. 3476.

V. The Trial Court Erred in Failing to Hold a *Marsden* Hearing Before Sentencing

Finally, defendant argues the trial court erred in failing to hold a *Marsden* hearing before sentencing in light of his letter to the court in which he stated he wanted to fire his counsel.

A. Relevant Factual Background

After trial but before sentencing, defendant sent the court two "consideration" letters regarding his dissatisfaction with his counsel and requesting his counsel be discharged. In his June 11, 2017, letter to the court, defendant listed detailed, numbered complaints with his counsel's performance. In his June 13, 2017, letter to the court, defendant explicitly stated, in relevant part: "My Attorney was told about all of this during the course of the proceedings (because he never did come interview for more than 2 minutes, one time) and said nothing, and did nothing about it. I would like him fired and this case appealed, Your Honor."

There is no evidence in the record that the court conducted a hearing pursuant to *Marsden*. Rather, it denied defendant's "Request for Consideration" as premature because "there has not been a sentencing."

B. Standard of Review and Applicable Law

Under *Marsden*, when a defendant in some manner moves to discharge current counsel, the trial court's duty is to inquire as to the reasons for the dissatisfaction and exercise its discretion in deciding whether to replace counsel. (See *People v. Lucky* (1988) 45 Cal.3d 259, 281; *Marsden*, *supra*, 2 Cal.3d at p. 124.) "[T]he trial court cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys." (*Marsden*, *supra*, at p. 123.) "'[T]he court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion.

Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]'" (*People v. Smith* (1993) 6 Cal.4th 684, 690–691.)

C. Analysis

Defendant argues, and the People concede, the court erred in failing to conduct a *Marsden* hearing in light of defendant's unequivocal statement in his June 13, 2017, letter to the court.

Here, it is uncontested defendant's statement in his June 13, 2017, letter triggered the court's duty under *Marsden* to inquire further into the reasons for defendant's dissatisfaction and then exercise its discretion accordingly. It is also undisputed the trial court did not hold a hearing despite defendant's statement that he would like to fire his counsel. While defendant detailed certain complaints he had with his counsel in his letters to the court, the court did not inquire further into the basis of defendant's complaints and does not appear to have considered defendant's letters as requests to discharge counsel in light of its order denying the Request for Consideration as "premature." The court's failure to hold a *Marsden* hearing or inquire further into the basis for defendant's dissatisfaction with his counsel before continuing with proceedings is generally considered prejudicial per se. (See *People v. Winbush* (1988) 205 Cal.App.3d 987, 991 ["The failure of a trial court to listen to defendant's reasons for wanting the replacement of appointed counsel must be remedied at the trial court level. An appellate court cannot speculate upon the basis of a silent record that the trial court, after listening to defendant's reasons, would decide the appointment of new counsel was unnecessary. Consequently, the very nature of the error precludes meaningful appellate review of its prejudicial impact"]; *People v. Hill* (1983) 148 Cal.App.3d 744, 755 ["Failure to inquire adequately into a defendant's complaints results 'in a silent record

making intelligent appellate review of defendant's charges impossible'"]; see *Marsden*, *supra*, 2 Cal.3d at p. 126.)

Accordingly, we agree with defendant's last contention, accept the People's concession, and remand to the trial court to hold a *Marsden* hearing. If the court determines defendant's counsel should have been dismissed, it is to appoint new counsel for defendant. New counsel may file a motion for a new trial to be heard at or before the new sentencing hearing.

DISPOSITION

We affirm defendant's conviction but remand this matter for the court to conduct a *Marsden* hearing. Should defendant be appointed new counsel, the trial court shall consider any motion for new trial before conducting a new sentencing hearing.

_____
PEÑA, J.

WE CONCUR:

_____
FRANSON, Acting P.J.

_____
DESANTOS, J.